Subramaniam a/l Gopal v Manjit Kaur a/p Sarjit Singh (administrator of the estate of G Santhirageran a/l Gopal, deceased) & Ors

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-22–01 OF 2015
VAZEER ALAM MYDIN J
9 MAY 2016

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Land Law — Sale of land — Sale by order of court — Plaintiff majority owner of property — Plaintiff applied for sale of property — Whether court has power to order sale of property — Whether court should order sale of property

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Trusts and Trustees — Land — Whether trust created over land — Plaintiff held half undivided share of property — Whether held on trust for beneficiaries

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The plaintiff and the defendants were beneficiaries to the estate of their late mother which had a registered interest in two residential in Taman Maluri, Cheras, Kuala Lumpur ('the first property') and Kg Pandan, Kuala Lumpur ('the second property'). The plaintiff was the registered owner of half undivided share in the first property. The estate's interest in all the properties had been fully distributed to the plaintiff and defendants. The plaintiff was now the majority owner of the shares in the first property with 7/12 share whereas the defendants held 1/12 share each. For the second property, all parties held 1/6 share each. In the present action, the plaintiff prayed for the properties to be sold by private treaty or public auction. The plaintiff alleged that the defendants had rented out both properties and have been collecting rental therefrom. Further, he was excluded from both properties and had never received any rentals or benefits from the properties. The plaintiff also contended that the fifth defendant had solely occupied the first property since 2004. The first defendant had agreed to the plaintiff's claim for both properties and thus, consent judgment was entered between the plaintiff and the first defendant. However, the second, third, fourth and fifth defendants had only agreed for the second property to be sold and objected the claim on the first property. The issues for court's determination were: (a) whether plaintiff held the half undivided share in the first property on trust for the beneficiaries to the estate of their late mother; and (b) whether the court should order the sale of the first property.

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Held, allowing the claim with costs of RM25,000:

(1) The onus of proving the trust was on the second, third, fourth and fifth defendants. The said defendants had failed to establish the fact of the plaintiff holding half share in the first property on trust for the plaintiff and defendants. Further, there was ample evidence showing that the plaintiff had financially contributed towards the purchase of the first property and had taken out and repaid the bank loan. The fact that the register document of title to the first property shows that the half share was registered in the name of the plaintiff absolutely, and not as trustee, was conclusive evidence of ownership (see paras 15 & 20).

(2) Pursuant to Items 3 and 4 of the First Schedule of the Courts of Judicature Act 1964, the High Court has the power to order the sale of land and to give all necessary and consequential directions for such sale. In the present case, it would be inequitable for the plaintiff as the majority owner of the property to be deprived of the benefit of ownership and only for the fifth defendant who had a 1/12 share to solely occupy and benefit from it. A joint ownership of property can be brought to an end by the court, if equity would be best served by its dissolution as in the present case (see paras 21 & 23).

[Bahasa Malaysia summary

Plaintif dan defendan-defendan adalah benefisiari kepada estet mendiang ibu mereka yang mempunyai kepentingan berdaftar dalam dua kediaman di Taman Maluri, Cheras, Kuala Lumpur ('hartanah pertama') dan Kg Pandan, Kuala Lumpur ('hartanah kedua'). Plaintif adalah pemilik berdaftar sebahagian syer yang tidak dibahagi di dalam hartanah pertama. Kepentingan estet dalam kesemua harta benda telah dibahagikan sepenuhnya kepada plaintif dan defendan-defendan. Plaintif adalah sekarang ini pemilik majoriti syer di dalam hartanah pertama dengan 7/12 syer sementara defendan-defendan memegang setiap 1/12 syer. Bagi hartanah kedua, kesemua pihak-pihak memegang setiap 1/6 syer. Dalam tindakan ini, plaintif memohon bagi hartanah-hartanah tersebut akan dijual oleh perjanjian persendirian atau lelongan awam. Plaintif mendakwa bahawa defendan-defendan telah menyewakan kedua-dua hartanah dan telah mengutip sewa daripadanya. Selanjutnya, dia diketepikan daripada kedua-dua hartanah dan tidak pernah menerima apa-apa sewa atau faedah daripada hartanah-hartanah tersebut. Plaintif juga berhujah bahawa defendan kelima sahaja yang menghuni hartanah pertama semenjak 2004. Defendan pertama telah bersetuju kepada tuntutan plaintif bagi kedua-dua hartanah dan oleh itu, penghakiman izin dimasukkan di antara plaintif dan defendan pertama. Walau bagaimanapun, defendan-defendan kedua, ketiga, keempat dan kelima hanya bersetuju bagi hartanah kedua dijual dan membantah tuntutan atas hartanah pertama. Isu-isu untuk penentuan mahkamah adalah: (a) sama ada plaintif memegang sebahagian syer yang tidak dibahagikan atas amanah untuk benefisiari-benefisiari kepada estet mendiang

ibu mereka; dan (b) sama ada mahkamah patut memerintah jualan hartanah pertama. A

Diputuskan, membenarkan tuntutan dengan kos sebanyak RM25,000:

(1) Beban untuk membuktikan amanah adalah ke atas defendan-defendan kedua, ketiga, keempat dan kelima. Defendan-defendan tersebut gagal untuk membuktikan fakta plaintif memegang sebahagian syer dalam hartanah pertama tersebut atas amanah untuk plaintif dan defendan-defendan. Selanjutnya, terdapat keterangan yang mencukupi menunjukkan bahawa plaintif telah dari segi kewangan menyumbang kepada pembelian hartanah pertama dan telah mengambil dan membuat bayaran balik pinjaman bank. Fakta bahawa dokumen hakmilik berdaftar kepada hartanah pertama menunjukkan bahawa sebahagian saham didaftarkan sepenuhnya dalam nama plaintif, dan bukan sebagai pemegang amanah, adalah keterangan konklusif pemilikan (lihat perenggan 15 & 20). B C D

(2) Berikutan kepada Perkara 3 dan 4 Jadual Pertama Akta Mahkamah Kehakiman 1964, Mahkamah Tinggi mempunyai kuasa untuk memerintah jualan tanah tersebut dan untuk memberi kesemua arahan perlu dan penting untuk jualan sedemikian. Dalam kes ini, ia akan menjadi tidak adil bagi plaintif sebagai pemilik majoriti hartanah dinafikan terhadap faedah pemilikan dan hanya untuk defendan kelima yang memegang 1/12 syer untuk satu-satunya menghuni dan mendapat faedah daripadanya. Milikan bersama hartanah boleh ditamatkan oleh mahkamah, jika ekuiti dapat dapat dilaksanakan melalui pembubarannya seperti dalam kes ini (lihat perenggan 21 & 23).] E F

Notes

For cases on sale by order of court, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 5299–5306. G

For cases on whether trust created over land, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 3175–3176.

Cases referred to H

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 1 MLRA 546, CA (refd)

Browne v Dunn (1893) 6 R 67, HL (refd)

Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, FC (refd) I

Teh Bee v K Maruthamuthu [1977] 2 MLJ 7; [1977] 1 LNS 134, FC (refd)

Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673, HC (refd)

Yap Miew Sang v Ng Lee Lee [2009] 4 MLJ 853; [2009] 2 MLRH 580, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 First Schedule, Items 3, 4
Evidence Act 1950 s 101

Clinton Gomez (Rajinder Singh Veriah & Co) for the plaintiff.
Suresh Subramaniam (Suresh, Sharvin & Co) for the defendants.

Vazeer Alam Mydin J:

[1] The plaintiff, the second, third, fourth, and fifth defendants and the late G Santhirasegaram a/l Gopal are siblings. The first defendant Majit Kaur a/p Sarjit Singh, who is the widow of G Santhirageram a/l Gopal, is the administrator of the estate of the late G Santhirageram a/l Gopal.

[2] The plaintiff and defendants are beneficiaries to the estate of their late mother Nagamah a/p Palsamy ('Nagamah'). The estate had a registered interest in two residential properties, namely:

(a) half undivided share of No 12, Jalan Pertiwi, Taman Maluri, Cheras, 55100 Kuala Lumpur, held under Geran HS(D) 11993, PT No 990, Mukim Ampang, Daerah Kuala Lumpur ('the first property'); and

(b) the whole of No 116, Lorong 6, Kg Pandan, 55100 Kuala Lumpur, held under Geran PM 110, Lot No 2751, Mukim Ampang, Daerah Kuala Lumpur ('the second property').

[3] The plaintiff was the registered owner of the other half undivided share in the first property. The estate's interest in the above two properties has been fully distributed wherein the registered ownership of the two properties is now as follows:

first property

the plaintiff — 7/12 share

the defendants — 1/12 share each person

second property

all parties — 1/6 share each

[4] The plaintiff avers that the fifth defendant solely occupies the first property, which is a two storey 5-bedroom house in Taman Maluri, Cheras, since 2004. The plaintiff further avers that the fifth defendant has rented out several rooms in the first property and has been collecting rental of RM900 per month since September 2004.

[5] The plaintiff also avers that the second property has been divided into three parts with separate entrances under the control of the third, fourth and fifth defendants, who have rented out the same and have been collecting rental of RM1,100 per month since September 2004.

[6] The plaintiff, who is owner of an undivided 7/12 share in the first property and a 1/6 undivided share in the second property has been excluded from these properties since September 2004 and has never received any rentals or benefits therefrom.

[7] Wherefore, the plaintiff prays for the following:

(a) that the first and second properties be sold by private treaty or public auction;

(b) that a registered valuer be appointed to prepare valuation reports for the two properties;

(c) that the plaintiff be given leave to make an offer to purchase the two properties;

(d) that the third, fourth and fifth defendants give a full and frank statement of rentals collected by them for the first and second properties and that the plaintiff be paid his share of the net rental proceeds; and

(e) judgment interest and costs.

[8] The first defendant did not contest the action and on 2 June 2015 consent judgment was entered between the plaintiff and the first defendant, wherein the first defendant agreed that the two properties be sold in accordance to the court's direction and that the net proceeds of sale be distributed to the parties in accordance to their respective share in the properties.

[9] The defence of the second, third, fourth and fifth defendants is as follows:

(a) when the first property was purchased, Nagamah could not obtain a bank loan as she did have documented earnings and as such the plaintiff was named as co-purchaser and registered as 1/2 owner in order to secure the bank loan as he was the only child above the age of 21 at that time and was employed with documented income. Thus, second to fifth defendants state that the plaintiff was holding the 1/2 share in the first property on trust for the beneficiaries of the estate of Nagamah;

(b) the loan repayments were made by Nagamah from compensation payment received by her late husband, the salary of the plaintiff, the third defendant and the late G Santhirasegaram a/l Gopal;

A (c) the first property is the family home and contains a memorial stone for Nagamah which is visited by all the family members for prayers and therefore should not be sold;

(d) the fifth defendant is bearing all the cost of repairs and maintenance of the first property; and

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(e) the fifth defendant denies renting out the first property for the sum of RM900 per month since 2004 and states that the plaintiff had been renting out the second property until September 2004 and has not accounted for the rentals to the defendants.

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[10] It is pertinent to note that the second to fifth defendants did not file any counterclaim in respect of their assertion that the plaintiff was holding the 1/2 share as trustee for the plaintiff and the defendants in equal share.

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[11] As for the second property, the second to fifth defendants do not object to its sale, save that they wish for it to be sold by way of a private treaty rather than a public auction or order or court.

E **[12]** The plaintiff in his reply to defence of the second to fifth defendants states as follows:

(a) the plaintiff denies holding the 1/2 undivided share in the first property on trust for the beneficiaries to the estate of Nagamah and further denies having agreed to have the said property divided equally between himself and the defendants;

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(b) the plaintiff denies that the fifth defendant was given the responsibility to care for the first property; and

G (c) the plaintiff denies collecting rental for the second property until September 2004.

[13] As the second to fifth defendants agree that the second property be sold, I recorded order in terms of the plaintiff's prayers in para 23(ii), (iii) and (iv) of the amended statement of claim. That leaves only the matter of the first property to be considered.

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[14] There were only two witnesses who testified at trial, namely, the plaintiff ('PW1') who gave evidence in his behalf; and the fifth defendant (DW1) who gave evidence for the second to fifth defendants.

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[15] The first issue that needs to be considered is the contention of the second to fifth defendants that the plaintiff was holding the 1/2 undivided share in the first property on trust for the beneficiaries to the estate of

Nagamah. The onus of proving the trust rests on the second to fifth defendants, who assert the same. The law is well settled that the burden of proof rests upon the party who desires any court to give judgment as to any legal right or liability dependent on the existence of facts that he asserts. See s 101 of the Evidence Act 1950 and *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 (FC). This was reiterated by Low Hop Bing J (later JCA) in *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673 in the following terms:

> Under s 101(1) of the Evidence Act 1950, whoever desires the court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. In other words, the plaintiff must prove such facts as the plaintiff desires the court to give judgment as to its right to claim against the defendant or the defendant's liability to pay the plaintiff. The burden of proof is on the plaintiff: s 101(2). In order to succeed here, the plaintiff must prove its claim affirmatively.

[16] PW1 testified that the allegation that he was holding the 1/2 share in the first property on trust is false. The plaintiff says that he contributed financially towards the purchase of the first property. He testified that he and Nagamah obtained a loan of RM20,000 from United Asian Bank Bhd ('UAB') to part finance the purchase of the first property and that he had contributed towards the monthly loan repayments to UAB. Nagamah was receiving a monthly pension of RM240 and worked as a maid to support the defendants. The plaintiff also testified that he and Nagamah jointly paid for the initial deposits for utilities connection and also the legal fees incurred for the purchase of the first property. The plaintiff testified that he was the only sibling who had a job and constant income at that time.

[17] The fifth defendant in his testimony stated that his father passed away when he was 11 years old and at that time they were staying in a squatter house at Taman Maluri. Thereafter, in 1982 the family shifted to the first property, which as the family home in which he and his other siblings grew up. The fifth defendant states that he was in Form 1 at the time. His late mother was then earning between RM200 to RM300 a month as a maid in Taman Maluri. He further testified that his late mother worked as a maid for about four to five years since moving to the first property. He said that until his mother's death, all household expenses were paid by his mother and that the plaintiff, second and third defendants would give their respective salaries to his mother, who would then pay all household expenses using this money.

[18] The fifth defendant during cross-examination agreed that he was only 11 years old in 1982. He does not really know the circumstances in which the first property was bought. He agreed that there was no evidence before the court showing that the plaintiff held his 1/2 share in the first property in trust

for the plaintiff and the defendants. The fifth defendant further agreed that it was the plaintiff who obtained a loan to purchase the first property and that there was no evidence showing that his late mother had paid the monthly repayments. In fact, the plaintiff produced his bank savings account book showing monthly deductions being made for the loan repayment and all payment receipts issued by the bank were in the name of the plaintiff.

[19] Further, the age at which a person can register an interest in land is 18 and not 21 years of age as alleged by the second to fifth defendants. That being so, if there is any truth to this allegation, then the property could have been registered in the name of the plaintiff, second and third defendants who were all above 18 at that time. The fact that this was not done lends credence to the plaintiff's contention that his 1/2 share in the first property is not held on trust.

[20] When the evidence is considered in its entirety, I find that the second to fifth defendants have failed to establish the fact of the plaintiff holding the 1/2 share in the first property on trust for the plaintiff and defendants. There is ample evidence showing that the plaintiff had financially contributed towards the purchase of the first property and had taken out and repaid the bank loan. There is no evidence of any contribution being made by the defendants towards the purchase of the first property. Nor is there evidence showing Nagamah solely contributing to the purchase. The fact that the second to fifth defendants did not file a counterclaim in respect of their allegation of an existing trust in respect of the plaintiff's registered 1/2 share in the first property speaks volume about this bare assertion. In fact this assertion was never put to the plaintiff during cross-examination by learned counsel for the second to fifth defendants, which falls fowl of the rule in *Browne v Dunn*. In the circumstance, the second to fifth defendants are deemed to have abandoned this defence. See *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 1 MLRA 546. The fact that the register document of title to the first property shows that the 1/2 share was registered in the name of the plaintiff absolutely, and not as trustee, was conclusive evidence of ownership. This is the principle on which the Torrens System of land registration functions. See *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7; [1977] 1 LNS 134 (FC).

[21] I now move on to consider whether the court should order the sale of the first property. The fact is that the plaintiff and defendants are joint owners of the first property, wherein the plaintiff holds 7/12 share and the defendants hold 1/12 share each. The fact is that the plaintiff holding majority of the share has been deprived of benefit from the first property. In fact the plaintiff has not been allowed anywhere near the property for a considerable period of time. The fifth defendant, to the exclusion of the plaintiff, now occupies the first property. The High Court has pursuant to Items 3 and 4 of the First Schedule

of the Courts of Judicature Act 1964, the power to order the sale of land and to give all necessary and consequential directions for such sale. See *Yap Miew Sang v Ng Lee Lee* [2009] 4 MLJ 853; [2009] 2 MLRH 580, which both counsel for the plaintiff and the second to fifth defendants have alluded to in their respective submissions.

[22] The next question to be asked is this: Should the court exercise this power to order a sale of the first property in the circumstance of the proven facts? My answer to that question is in the affirmative for the following reasons.

[23] The plaintiff is the legal and beneficial owner of 7/12 share in the first property, whilst the second to fifth defendants hold a combined 4/12 share. The first defendant, who holds 1/12 share, has agreed to the sale of the first property, as borne out by the consent judgment entered earlier in this action. Therefore, the majority owners with a combined 8/12 share of the property, which is equivalent to two thirds of the undivided share, are asking for an order for sale as they have been deprived of all benefits as owners of the property for a considerable length of time. It seems that it is only the fifth defendant who is deriving any benefit from the property. In the circumstance, I find that it would be inequitable for the majority owners to be deprived of the benefit of ownership and only for the fifth defendant who has a 1/12 share to solely occupy and benefit from it. A joint ownership of property can be brought to end by the court, if equity would be best served by its dissolution. In the present case, that seems so.

[24] The fact that the first property used to be the family home of the parties and that a memorial stone to their mother is situated there does not in anyway support the contention of the second to fifth defendants that the property should not be sold. Family sentiments and emotions cannot be determining factors in the circumstance of the facts of this case. The fact that the plaintiff has been denied access to the first property for many years by itself defeats this argument. The court would have to give due regard to the interests of all joint owners. In any event the plaintiff has offered to purchase the first property and if allowed that would mean that the property remains within the family. If the fifth defendant wishes to keep the property he too can make a bid for it.

[25] In the premise of the foregoing, I entered judgment for the plaintiff in respect of the claim as regards both the first and second property and granted order in terms of prayers in para 23(i)–(vii) of the amended statement of claim together with cost of RM25,000 to be borne and paid by the second to fifth defendants.

Claim allowed with costs of RM25,000.

Reported by Dzulqarnain Ab Fatar